The Malayan Law Journal

1972

BEING

REPORTS OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL

SINGAPORE REPORTS

LEE CHOH PET & ORS. v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin, C.J., Chua and Choor Singh JJ.) October 27, 1971]

[Singapore — Criminal Appeal No. 11 of 1970]

Criminal Law and Procedure — Trial — Whether court of two judges hearing capital offence charge can substitute therefor a lesser one — Whether a nullity — Supreme Court of Judicature Act (Cap. 15, 1970 Ed.), s. 10 — Criminal Procedure Code (Cap. 113, 1970 Ed.), s. 185.

The appeals in this case depended substantially on the same facts and involved the same question of law. These appeals required a decision on the construction and true effect of section 10(1) of the Supreme Court of Judicature Act which provides that "every proceeding in the High Court and all business arising thereout shall, save as otherwise provided by any written law for the time being in force, be heard and disposed of before a single judge." Section 185 of the Criminal Procedure Code lays down that "in all cases where the accused is charged with an offence in respect of which punishment of death is authorised by law, the accused shall be tried by a court consisting of two judges of the High Court, one of whom shall be the presiding judge."

The main question raised was whether or not a court consisting of two judges of the High Court, constituted under section 185 of the Criminal Procedure Code, which proceeds to hear a charge in respect of an offence punishable with death, can, at the close of the prosecution case, substitute for the said charge, a charge in respect of an offence punishable with imprisonment and proceed to hear the defence of the accused on the substituted charge.

Based on these provisions, the appellants disputed the validity of the trial and their convictions. The facts appear sufficiently in the judgment.

Held, dismissing the appeals: the trial court being a court of two judges constituted under section 185 of the Criminal Procedure Code, was expressly authorized by section 185(3) of the Code to convict the accused "of any lesser offence of which he could have been charged based on the same facts." Under the circumstances the trial court was acting well within its powers in framing the charge of extortion under section 386 of the Penal Code, taking the plea of the appellants on it, hearing their defence and convicting them on the said charges.

Observations on effect of substitution of a charge in the same proceedings.

Cases referred to:-

(1) *Chow Kim Hoong* v. *Public Prosecutor* [1971] 2 M.L.J. 137.

(2) *Lee Chee Wan & Ors.* v. *Public Prosecutor* [1961] M.L.J. 62.

(3) *Khalid Panjang & Ors.* v. *Public Prosecutor* [1964] M.L.J. 67.

COURT OF CRIMINAL APPEAL.

Leo Fernando for appellant No. 1.

Kirpal Singh for appellant No. 2.

M. Loganathan for appellant No. 3.

S. Rajendran (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Choor Singh J. (delivering the judgment of the court): The appeals of the three appellants in this case depend substantially on the same facts and involve the same questions of law. Their appeals require a decision on the construction and true effect of section 10(1) of the Supreme Court of Judicature Act which provides that "every proceeding in the High Court and all business arising thereout shall, save as otherwise provided by any written law for the time being in force, be heard and disposed of before a single judge." One of the written laws which provides otherwise is section 185 of the Criminal Procedure Code which lays down that "in all cases where the accused is charged with an offence in respect of which punishment of death is authorised by law, the accused shall be tried by a court consisting of two judges of the High Court, one of whom shall be the presiding judge." Based on these provisions of the law certain questions have been raised as affecting the validity of the trial and the convictions of the three appellants.

The main question of law raised is, whether or not, a court, consisting of two judges of the High Court, constituted under section 185 of the Criminal Procedure Code, which proceeds to hear a charge in respect of an offence punishable with death, can, at the close of the prosecution case, substitute for the said charge a charge in respect of an offence punishable with imprisonment and proceed to hear the defence of the accused on the substituted charge.

In order to examine this question of law, it is necessary to trace, in the briefest manner possible, the course of the proceedings before the trial court in this case. The trial of the three appellants commenced before a court of two judges of the High Court, constituted under section 185 of the Criminal Procedure Code. There were three charges against each of the

appellants alleging that they had in furtherance of their common intention: —

first, abducted one Ong Beang Leck at 7.30 p.m. on 24th May, 1968, with intent to hold him for ransom, an offence punishable under section 3 of the Punishment of Kidnapping Ordinance, 1961;

secondly, that all three of them abducted the said Ong Beang Leck at the same time on the same date in order that the said Ong Beang Leck may be murdered, an offence punishable under section 364 of the Penal Code; and

thirdly, that they had committed murder by causing the death of the said Ong Beang Leck, an offence punishable under section 302 of the Penal Code. The time alleged in the third charge was "some time between 7.30 p.m. and 12 midnight" on the same day, that is after they had abducted him.

The offences mentioned in the first and second charges are punishable with death or imprisonment for life and the offence mentioned in the third charge is punishable with death. As all the three offences carry the death penalty, the court was, as required, constituted in accordance with the provisions of section 185 of the Criminal Procedure Code and was therefore competent to try the appellants on the three charges which they faced.

All the three appellants claimed trial on all the three charges and the prosecution proceeded to call their evidence in support of the charges. At the close of the prosecution case, the court found that the prosecution had made out a case against all the three appellants on the second and third charges which if unrebutted would warrant their conviction; that the prosecution had failed to make out such a case against all three appellants on the first charge; and that a *prima facie* case of extortion in contravention of section 386 of the Penal Code had been made out against all of them. The presiding judge, after giving the court's reasons for coming to this decision, observed: —

".....We therefore do not propose to call upon the accused for their defence on this first charge. But there is evidence before us which makes it a *prima facie* case of extortion under section 386 of the Penal Code, and we propose to frame a new charge in substitution of the former one. There will be a formal verdict of acquittal on the first charge. All three accused are acquitted on the first charge but there is a new charge which we have framed in substitution."

The following charge was then read out and explained to all the appellants: —

".....You are charged that you, between the 26th day of May, 1968 and the 5th day of June, 1968 together with two other persons, namely, Richard Lai Choon Seng and Chow Siew Cheong, alias Ah Cheong, in furtherance of the common intention of you all committed extortion by putting one Ong Yew Kee in fear of grievous hurt being caused to Ong Beang Lek, and thereby dishonestly induced the said Ong Yew Kee to deliver to you $20,000 an offence punishable under section 386 of the Penal Code (Chapter 119) read with section 34 of the said Code."

At this stage there was some discussion between the presiding judge and the deputy public prosecutor as to whether this charge was in substitution for the first charge or an additional charge and the court finally ruled that it was an additional charge.

As all the three appellants claimed trial on this new charge, they were called upon to enter upon their defence on this charge as well as on the second and third charges. In view of the new charge they were given the usual facilities of recalling any witness who had already given evidence for the prosecution and there is no complaint at all in this respect. The trial proceeded and at its conclusion all three appellants were convicted on all three charges. They were sentenced to death on the charges of murder and kidnapping for murder and the sentence on the charge of extortion was suspended.

On these facts, it is contended on behalf of the appellants that the trial court had no jurisdiction to try the appellants on the two existing capital charges together with the substituted non-capital charge and that, therefore, the whole trial was a nullity. In support of this contention, the judgment of this court in *Chow Kim Hoong* v. *Public Prosecutor*,[1] is relied upon. In that case this court held that a court of two judges as constituted under section 185 of the Criminal Procedure Code has no jurisdiction to try an accused person on two charges, one of which is a charge in respect of a non-capital offence. In that case, from the commencement of the proceedings, one of the charges was in respect of a non-capital offence and in those circumstances this court held that the whole trial was a nullity and ordered a re-trial.

Reliance is also placed upon a decision of the Court of Appeal of Malaya in *Lee Chee Wan* v. *Public Prosecutor*,[2] where the Malayan Court of Appeal held that the trial of six persons before a jury on two charges of murder and one charge of attempted murder was a nullity because the trial of an accused person on a non-capital charge is to be had before a judge alone. In *Lee Chee Wan's* case the non-capital charge of attempted murder was before the jury at the very commencement of the proceedings.

On the other hand, counsel for the Public Prosecutor contends that the convictions of all the appellants on all the three charges on which they were convicted are valid in law and he relies on the decision in *Khalid Panjang & Ors.* v. *Public Prosecutor*,[3] which is a decision of the Federal Court of Malaysia concerning jury trials. It was decided in that appeal that at some stage prior to the commencement of a trial in the High Court the question of the mode of the trial must be decided, *i.e.* whether it is to be tried by jury or by a judge alone; that the criterion is that contained in section 200 of the Criminal Procedure Code which provides that "in all cases where the punishment of death is authorised by law the accused shall be tried by a jury"; that the only practicable time at which the criterion is to be applied is the commencement of the trial; that once a trial has commenced before a jury it can only be terminated, apart from questions of irregularity and so forth by a verdict of the jury which must be either that the accused person is guilty or not guilty of either the offence with which he was originally charged or any other offence for which he could be convicted on the original charge by reason of the provisions of the Code as a whole.

The report of the judgment in *Khalid Panjang's* case does not reveal the full facts of the case, but it is quite apparent that when the trial commenced there was one charge only — a charge of murder — which required that the trial be by jury. In the course of the trial the charge was amended in the case of three

of the appellants and an additional non-capital charge was framed against the other appellant. The Federal Court held that what was done in that case was not legally wrong but expressed the opinion that the addition of the non-capital charge although legally correct was something that was undesirable. In dismissing the appeals of all the appellants, Thomson L.P., who delivered the judgment of the court, said, at page 68: —

"The effect of what we have said therefore is that we consider the grounds of appeal arising from the amendment of the charge in the case of three appellants and the additional charge in the case of the other one are without substance."

The Federal Court referred to its earlier decision in *Lee Chee Wan & Ors.* v. *Public Prosecutor*, that a trial by jury for two capital offences together with a non-capital offence is a nullity and emphasised that that decision must be read in the light of what the court had just then decided, namely that the time at which the criterion as to the mode of trial is to be applied is the commencement of the trial.

Counsel for the Public Prosecutor contends, on the strength of *Khalid Panjang's* case, that if at the commencement of the trial on a charge in respect of a capital offence, the court is properly constituted and competent to try that charge, then the court is, during the course of the same proceedings, entitled to try the accused person on any lesser charge which, by reason of the provisions of section 156 of the Criminal Procedure Code, it is entitled to substitute for the existing charge or add as an additional charge to the existing charge. Counsel's submission is that the substituted charge or the additional charge need not be a capital charge; that the criterion as regards the mode of trial *i.e.* whether the trial should be before a court of two judges or before a single judge is to be applied at the commencement of the trial and that once the trial has commenced before a competent court, the accused person can be tried and found guilty on the original charge or any other charge which the court is competent to frame against the accused by reason of the provisions of the Criminal Procedure Code. Counsel argues that in this case, when the trial commenced before a court of two judges, all the charges against all the three appellants were in respect of capital offences; that at the close of the prosecution case the trial court was entitled by virtue of the provisions of section 156 of the Criminal Procedure Code to substitute the charge of extortion in contravention of section 386 of the Penal Code in place of the first charge on which all the three appellants were acquitted; and that there was no question of the competency of the court to try the appellants on this new charge under section 386 of the Penal Code because on the authority of *Khalid Panjang's* case that question must be considered at the commencement of the trial.

Much was made before us, by counsel for the first appellant, of the fact that the appellants were acquitted on the first charge at the close of the prosecution case. Counsel submitted that such acquittal was a final judgment and that from that stage onwards there were new proceedings incorporating a new charge. Although the trial court ruled that the charge under section 386 of the Penal Code was an additional charge, we are of the opinion that in effect and in law it was a charge in substitution for the first charge of kidnapping for ransom; that the substitution took place in the same proceedings and that it is completely wrong to suggest that new proceedings commenced when the charge under section 386 of the Penal Code was framed and explained to the appellants. Furthermore, in our opinion it is immaterial whether the charge under section 386 of the Penal Code was in substitution for the first charge or was an additional charge, because the framing of the said charge against the appellants was well within the powers of the trial court by virtue of the provisions of section 156 of the Criminal Procedure Code. The crucial question however is whether the trial court, after having framed the substituted charge and taken the plea of the appellants on it, was competent to continue the proceedings.

We find that the position in the present case is similar to what happened in *Khalid Panjang's* case. In both cases, when the trial commenced, the court was properly constituted and competent to hear the charge or charges against the accused persons. In *Khalid Panjang's* case there was one charge only and it was a charge of murder which required that the trial be by jury. In the present case there were three capital charges which required that the trial be before two judges of the High Court. In both cases, in the course of the trial, a non-capital charge was introduced which charge in both cases was ordinarily triable by a single judge. The Federal Court of Malaysia held that what was done in *Khalid Panjang's* case was not legally wrong because the court was entitled to convict the accused "of any other offence for which he could be convicted on the original charge by reason of the provisions of the Code as a whole."

In the present case, the trial court being a court of two judges constituted under section 185 of the Criminal Procedure Code, was expressly authorised by section 185(3) of the Code to convict the accused "of any lesser offence of which he could have been charged based on the same facts." Under the circumstances the trial court was in our opinion acting well within its powers in framing the charge of extortion under section 386 of the Penal Code, taking the plea of the appellants on it, hearing their defence and convicting them on the said charge. For these reasons we hold that the point taken on behalf of the appellants fails. We have not been into the merits of their appeal except so far as it was necessary to consider the point of law. We will now hear counsel upon the merits.

Appeals dismissed.

Solicitors: *Ironside & de Souza; Mallal & Namazie; Loganathan & Co.*